

## **Bankruptcy Circuit Update**

*Featuring cases from October 2017*

### ***Special Announcement Group Section Conference Call to Discuss Significant Cases***

This month our writers Circuit Writers and Section Leaders will be convening our third section-wide conference call on **Friday, December 1st, at 3:30 E.S.T./12:30 P.S.T.** to present and discuss notable cases from the past few months of the summaries. Volunteers will be summarizing significant or interesting cases. The presenters will be open for questions and lead discussion of key points. We hope you will join us for this call. The call-in information is: **dial in 866-690-2070 – code 787-594-2077**. If any section–members, whether or not you are a Circuit Writer, would like to volunteer to discuss a significant case or recent bankruptcy development, please e-mail us at [csullivan@diamondmccarthy.com](mailto:csullivan@diamondmccarthy.com).

### **Second Circuit**

***Boyd v. Rescap Borrower Claims Tr. (In re Residential Capital, LLC),  
16-2950 (2d Cir., October 4, 2017)***

In an appeal deriving from the bankruptcy case of Residential Capital, LLC, the Second Circuit affirmed the district court’s holding affirming the bankruptcy court’s sustaining the objection of ResCap Borrower Claims Trust (the “Trust”) to the proof of claim filed by Michael Edward Boyd (“Boyd”).

Boyd’s proof of claim was based on claims he raised in a 2011 lawsuit in the Northern District of California against GMAC Mortgage, LLC, the servicer of loans secured by mortgages on two of Boyd’s California properties. The Northern District of California dismissed the claims, the Ninth Circuit affirmed, and the Supreme Court denied certiorari. The bankruptcy court sustained the Trust’s objection to Boyd’s proof of claim, concluding that it was barred by res judicata. On appeal, Boyd argued that the bankruptcy court lacked jurisdiction to resolve his state law claims and also sought review of the district court’s denial of his motion to transfer the case to the California district court.

First, the Second Circuit reasoned that the district court properly held that the bankruptcy court had jurisdiction over Boyd’s claim, noting that a claimant who files a proof of claim with the bankruptcy court willingly submits to the bankruptcy court’s claims allowance process, and therefore has submitted itself to the bankruptcy court’s equitable jurisdiction in proceedings affecting that claim. Here, Boyd submitted to the bankruptcy court’s jurisdiction concerning objections to his claim when he filed the proof of claim, even though it was based on state law claims.

The Second Circuit also affirmed the district court’s denial of Boyd’s request to transfer his appeal to the Northern District of California, noting that, pursuant to 28 U.S.C. § 158(a), an

appeal is permitted only “to the district court for the judicial district in which the bankruptcy judge is serving,” which in this case was the Southern District of New York. The Second Circuit also noted that Boyd did not assert any argument in support of his challenge to the denial of venue transfer.

***Silver v. ResCap Borrower Claims Tr. (In re Residential Capital, LLC),***  
**16-1273 (2d Cir., October 11, 2017)**

The Second Circuit affirmed the judgment of the district court affirming the bankruptcy court’s orders disallowing the claim filed by Francine Silver (“Silver”) with the ResCap Borrower Claims Trust for wrongful foreclosure and unjust enrichment by the debtor, and denying her unopposed motion for immediate payment of that claim. Silver also challenged the impartiality of both the bankruptcy and district court judges.

The Second Circuit first conducted a plenary review of merits of the district court decision, noting that it agreed that the bankruptcy court had properly denied Silver’s claims. Regarding the judge’s impartiality, the Second Circuit noted that Silver had raised this issue for the first time on appeal, and though the Second Circuit had discretion to reach such argument, it declined to do so because the argument was available to Silver earlier and she did not justify her failure to raise it in a lower court. Silver argued that her failure was explained by her discovery of the facts on which she based her partiality claim only after the district court ruled against her. However, the Second Circuit noted that such facts were a matter of public record and were therefore available to Silver long before the challenged ruling.

***Momentive Performance Materials Inc. v. BOKF, NA (In re MPM Silicones, L.L.C.),***  
**15-1682 (L), 15-1824 (CON), 15-1771(2d Cir., October 20, 2017)**

In an appeal by three creditor groups from the confirmation of the plan of reorganization of Momentive Performance Materials Inc. (“MPM”), which filed for bankruptcy in 2014 and had its plan confirmation affirmed by the district court in 2015, the Second Circuit held that the plan comported with the provisions of Chapter 11 except for a single deficiency related to the process for determining the proper interest rate under the cramdown provision of Chapter 11.

The Second Circuit’s opinion addressed the following four issues:

*I. Subordination*

The first issue addressed by the Second Circuit related to subordination provisions in the indentures at issue. The holders of MPM’s subordinated notes received no recovery under the plan, and argued on appeal that such notes were not in fact subordinate (per the indenture) to the second lien notes that did partially recover. The courts below found the indenture unambiguously to subordinate the subordinated notes.

The Second Circuit found the provisions ambiguous, but resolved the ambiguities in favor of the debtors. The indenture provided that the subordinated notes were “subordinated in right of payment” to all “Senior Indebtedness.” Carved out from Senior Indebtedness was “any . . . obligation . . . that . . . is subordinate or junior in any respect to any other . . . obligation . . . .” The lower courts found that, although the second lien notes were junior to the debtors’ senior lien notes, this was only with regard to their liens, and not to payment, and that therefore the carve-out did not apply. The Second Circuit found this ambiguous, because “in right of payment” did not modify “in any respect” but was in another part of the indenture. Nevertheless, the Second Circuit concluded, given the extensive evidence that the parties intended the second lien notes to be “Senior Indebtedness,” that this ambiguity should be resolved in favor of the debtors. In doing so, the Second Circuit relied on New York law and considered extrinsic evidence to give effect to the expressed intentions of the parties, including SEC filings and evidence based on commercial reasonableness and the parties’ courses of dealing prior to litigation.

## *II. Interest Rate*

Pursuant to its terms, if holders of senior lien notes had accepted the plan, they would have received cash equal to outstanding principal and interest under such notes, but without a make-whole premium. Instead, they rejected the plan and were crammed down, receiving under the plan replacement notes with a present value equal to the allowed amount of their claims. Such holders argued that they were entitled to the make-whole premium and also contested the interest rate on the replacement notes.

Specifically, such noteholders argued that the interest rate on the replacement notes was too low and should not have been approved because it was largely risk-free and was well below ascertainable market rates for similar debt obligations, and it therefore was not fair and equitable to the noteholders because it failed to provide the present value of the noteholders’ claims.

The bankruptcy court found that the plan was fair because the interest rate, even though below a market rate, was determined by a formula that complied with the Bankruptcy Code’s cramdown provision. The district court affirmed.

On this issue, the Second Circuit adopted the two-part process for selecting an interest rate in Chapter 11 cramdowns that had previously been employed by the Sixth Circuit, which requires that (i) a market rate should be applied in Chapter 11 cases where there exists an efficient market, but (ii) if no such efficient market exists, then the bankruptcy court should employ the formula approach endorsed by the plurality in *Till v. SCS Credit Corp.*, 541 U.S. 465 (2004).

The Second Circuit noted that the holders of senior-lien notes had presented expert testimony in the bankruptcy court that, if credited, would have established a market rate. The Second Circuit held that the bankruptcy court should not have categorically rejected this evidence, and accordingly remanded this issue to the bankruptcy court to ascertain if an efficient market rate exists and, if so, to apply that rate, instead of the formula rate.

## *III. Make-Whole*

The third issue that the Second Circuit addressed concerned the make-whole premium. The senior lien notes indenture included an optional redemption clause, which provided for payment of a make-whole premium if the notes were redeemed at the debtors' option prior to October 2015—this provision would compensate the noteholders for interest they would not receive if the notes were redeemed before maturity. The debtors' issuance of replacement notes in 2014 did not include a make-whole premium, in potential violation of this provision of the indenture. The lower courts all concluded that the indenture provision was not triggered, holding that the make-whole premium would only become due in an optional redemption and not from an acceleration caused by a bankruptcy filing.

The noteholders argued that issuance of the replacement notes was an optional redemption, prior to maturity. The Second Circuit rejected this argument, following *In re AMR Corp.*, 730 F.3d 88, 103 (2d Cir. 2013): “[The] bankruptcy petition triggered a default, and this default automatically accelerated the debt. That acceleration changed the date of maturity from some point in the future . . . to an earlier date based on the debtor’s default . . . . Consequently, [the] attempt to repay . . . was not a voluntary prepayment because [p]repayment can only occur *prior* to the maturity date.” The court also concluded that there was no practical difference between “redemption” and “prepayment”. Indeed, the first lien noteholders conceded that the “plain meaning of the term ‘redeem’ is to ‘repay[] . . . at or before maturity.’”

The court also concluded that the obligation to issue the replacement notes came about automatically because of automatic acceleration upon an event of default, namely a bankruptcy filing, and thus could not be “optional”. If the indenture had given the noteholders the option to accelerate, the analysis might have differed.

Finally, the noteholders argued that they should have been able to exercise their contractual right to rescind acceleration, reinstating the original maturity date and keeping the redemption clause and the make-whole in effect. The Second Circuit, citing *AMR*, concluded that post-petition invocation of a contractual right to rescind acceleration would be barred because it would be an attempt to modify contract rights and thus be subject to the automatic stay.

#### *IV. Equitable Mootness*

Finally, the Second Circuit addressed the debtors' argument to seek dismissal of these appeals under the principle of equitable mootness, which is a prudential doctrine that is invoked to avoid disturbing a reorganization plan once implemented. The Second Circuit noted that when a reorganization plan has been substantially consummated, it generally presumes that an appeal of that plan is equitably moot. That presumption, however, gives way where five factors are satisfied: (i) effective relief can be ordered; (ii) relief will not affect the debtor's re-emergence; (iii) relief will not unravel intricate transactions; (iv) affected third-parties are notified and able to participate in the appeal; and (v) appellant diligently sought a stay of the reorganization plan.

The Second Circuit noted that it places significant reliance on the fifth factor. Here, the appellants immediately objected to various provisions of the plan and promptly and consistently sought a stay in three different courts. The Second Circuit also noted that, in light of the limited nature of its remand, the plan as a whole would not be rendered unviable. Even the debtors

acknowledged that if the bankruptcy court on remand were to apply a market interest rate (rather than a formula rate), such decision might require, at most, \$32 million of additional annual payments over seven years. Accordingly, the Second Circuit denied the debtors' request to dismiss these appeals as equitably moot.

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### **Fifth Circuit**

#### ***Matter of Xenon*, 698 Fed. Appx. 793, 2017 WL 4641267 (5th Cir. Oct. 16, 2017)**

Mujtaba Ali Khan (“Khan”) and Xenon Health LLC (“Xenon Health”) filed proofs of claim in Debtor Xenon Anesthesia of Texas P.L.L.C.’s (“Xenon Texas”) Chapter 7 bankruptcy. Khan subsequently objected to Xenon Health’s proof of claim and thereafter withdrew his own proof of claim.

In opposing Khan’s objection, Xenon Health argued he lacked standing to object because he was not a party in interest in Xenon Texas’s bankruptcy. Indeed, before the petition date, Khan was involved in a state court dispute regarding the purported transfer of his interest in Xenon Texas to a third party. That case resulted in a final judgment pursuant to which Khan definitively transferred his equity in Xenon Texas to that individual via an Equity Interest Assignment Agreement (the “2015 Equity Agreement”). Based on these facts, the bankruptcy court found Khan lacked standing to object to Xenon Health’s proof of claim because he was no longer an equity holder in the Debtor, and Khan timely appealed.

On appeal, the Fifth Circuit explained a party in interest is anyone who has a legally protected interest that could be affected by the bankruptcy case, including (i) anyone who files a proof of claim and (ii) equity holders, provided there is a possibility of a surplus after the satisfaction of claims. Khan argued that the transfer of his equity was ineffective because the 2015 Equity Agreement was void pursuant to *Xenon Health, LLC v. Baig*, 662 Fed. App’x 270 (5th Cir. 2016). In that case, the Fifth Circuit found a different Equity Interest Assignment Agreement void because it violated the Texas Medical Practice Act. Here, however, the Court summarily dismissed Khan’s argument, explaining that the 2015 Equity Agreement was different than the agreement at issue in *Baig*. Therefore, because (i) Khan did not hold equity in the Debtor and (ii) he had withdrawn his proof of claim, he was not a party in interest in the proceeding.

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***Hawk v Engelhart (In re Hawk)*, --- F.3d ---, 2017 WL 3974272 (5th Cir. Sept. 5, 2017), abrogating *In re Smith*, 514 B.R. 838 (Bankr. S.D. Tex. 2014).**

In this matter of first impression for the Fifth Circuit, the court examined whether a Chapter 7 debtor who withdraws funds from a retirement account and does not deposit the funds into another retirement account within sixty days loses the exemption afforded under Texas Property Code § 41.0021(a).

On December 15, 2013, the Hawks filed Chapter 7 bankruptcy. As part of their schedule of assets, they claimed an exemption for funds held in an individual retirement account (IRA) under Texas Property Code § 42.0021 and 11 U.S.C. § 522(b). Through December 11, 2013 to July 14, 2014, the Hawks withdrew all the IRA funds and used the funds to pay for living and other expenses. The Trustee learned about the liquidated IRA funds and subsequently demanded that the Hawks give the funds to the estate. The Hawks refused, and the Trustee filed a motion requesting that the Hawks be compelled to turn over the withdrawn funds. The Bankruptcy Court for the Southern District of Texas, which was affirmed by the District Court, concluded that the Hawks were required to turn over the liquidated funds because the funds lost their exemption status when then the Hawks did not reinvest the funds into another IRA within 60 days after the date of distribution.

Disagreeing with the lower courts, the Fifth Circuit held that the liquidated funds did not lose their exemption and therefore, the Trustee could not compel the Hawks to turn over the funds to the estate on that basis. Ultimately, the court determined that the Bankruptcy Code did not afford a means by which the liquidated funds could become part of the Hawk's Chapter 7 estate.

The court reconciled its holding with other Fifth Circuit precedent pertaining to Texas homestead exemptions in Chapter 7 and Chapter 13 proceedings. The application and reconciliation of this precedent was proper, according to the court, because the Texas statutes governing homesteads and retirement accounts are very similar.

The court's Chapter 7 case, *In re Zibman*, involved debtors that sold their Texas homestead prior to filing for bankruptcy. The debtors did not reinvest the sale proceeds in another homestead within six months of sale, and therefore, the court held that the trustee could reach the proceeds as part of the bankruptcy estate. In part, the *Zibman* court reasoned that "the intent of 'the proceeds exemption in [the] statute was *solely* to allow the claimant to invest the proceeds in another homestead, *not to protect the proceeds in and of themselves.*' "

The *Hawk* court then examined *In re Frost*, a Chapter 13 proceeding involving a debtor who sold his Texas homestead during the pendency of bankruptcy proceedings and failed to reinvest the sale proceeds in another homestead within six months of the sale. The *Frost* court

held that the proceeds were no longer exempt from the estate because the debtor failed to reinvest the proceeds in another homestead within six months of the sale.

The Hawks asserted that *Frost* should not apply to their Chapter 7 case as *Frost* was a Chapter 13 proceeding subject to 11 U.S.C. § 1306(a)(1) which permitted the court to bring proceeds that became nonexempt after the expiration of the statutory time-limitation back to the estate. Further, the Hawks argued that Chapter 7 of the Bankruptcy Code does not contain a similar provision, and therefore there is no means by which the liquidated IRA funds can become part of the estate. The Fifth Circuit agreed:

When the Hawks withdrew funds from the IRA, the Hawks' property interest changed from an interest in assets held in a retirement account to an interest in "[a]mounts distributed from a [retirement] account." . . . But because § 1306(a)(1) applies only in Chapter 13 cases and no similar provision applies in a Chapter 7 case, there was no means by which the Hawks' newly acquired property interest could become part of the Chapter 7 estate.

The court further substantiated its reasoning by examining the intended results of Chapter 13 and Chapter 7 cases. Chapter 13 permits a debtor to retain his property if he so wishes and repay his debts over a three to five year period should a court confirm a plan to do so. To facilitate such a plan, 11 U.S.C. § 1306(a) permits creditors to be paid from the debtor's prepetition property and post-petition property. Thus, a new property interest that a debtor acquires after filing bankruptcy becomes part of the estate. Conversely, while a Chapter 7 debtor is required to forfeit all his prepetition, nonexempt property to pay off his prepetition creditors, he is given the opportunity for a "fresh start" from his financial history by being given the right to shield his post-petition earnings and acquisitions from creditors. Accordingly, when a Chapter 7 debtor acquires a new property interest after filing for bankruptcy, such property interest does not become part of the bankruptcy estate, "even if the debtor acquires the new property interest by transforming a previously exempted asset into a nonexempt one."

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## **Ninth Circuit**

### ***Aspen Skiing Company v. Cherrett (In re Cherrett),* — F.3d. — (9th Cir. 2017)**

In *Cherrett*, the Ninth Circuit affirmed the BAP’s decision affirming the bankruptcy court’s denial of creditor Aspen Skiing Company’s (“ASC”) §707(b)(1) motion to dismiss a Chapter 7 case. The bankruptcy court denied the motion because the Debtor’s mortgage loan was not a consumer debt and therefore the Debtor’s debts were not primarily consumer debts.

As part of a compensation package to induce Debtor to take a job in Aspen, Colorado, ASC offered Debtor an interest-only mortgage loan and guaranteed bonuses sufficient to make the interest payments for ten years. Debtor could not otherwise afford to live in Aspen, which was a requirement of the job. Debtor expected that after a period of time, ASC would relocate Debtor back to Wyoming where his family and home remained. If Debtor left the job within 8 years, he would be required to repay the loan and pay ASC additional amounts based on how long he stayed in the job. Debtor used the loan to purchase a condo in Aspen and ultimately resigned from ASC.

The bankruptcy court held that ASC offered the mortgage to entice Debtor to leave a secured position in Wyoming, and Debtor purchased the Aspen property so he could “make more money” and “work at a prestigious, top of the line” resort. As a result, the bankruptcy court determined that the mortgage was incurred for a business purpose and was not a consumer debt. The BAP affirmed.

The Ninth Circuit held that the bankruptcy court’s order was a mixed question of law and fact and that courts were split on the standard of review for denial of §707(b)(1) motions. The Circuit held that because the bankruptcy court weighed Debtor’s multiple motives for incurring the mortgage debt, it was an “essentially factual” inquiry that should be reviewed for clear error. The Circuit found no clear error but noted it would have reached the same result under a de novo review.

Judge Nguyen dissented and wrote that because none of the underlying facts were disputed, the standard of review should be de novo under the binding precedent of *In re Kelly*, 841 F.2d 908 (9th Cir. 1988). Judge Nguyen wrote that every circuit to review a bankruptcy court’s ruling on whether a particular obligation is a consumer debt has done so de novo, and that the majority conflated Debtor’s purpose in moving to Aspen with his purpose in taking out the mortgage loan. The question is whether the Debtor incurred the debt to purchase a personal residence, not whether the debt indirectly facilitated a business purpose. Judge Nguyen would have held that the debt was a consumer debt and reversed the denial of the §707(b)(1) motion.

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## Tenth Circuit

***In re Wallace*, No. 16-10312 t11,  
2017 WL 4773106 (Bankr. D. N.M. Oct. 19, 2017)**

The bankruptcy court held that it had the right, and perhaps the duty, to examine the reasonableness of debtor's counsel's fees after dismissal of the debtor's chapter 11 case. The debtor moved the court to approve a settlement between the debtor and her primary secured creditor, with which the debtor had been litigating, and also to dismiss her chapter 11 case. During the pendency of the case, debtor's counsel, whose retention had been approved by the bankruptcy court at the outset, neglected to file an interim or final application for compensation even though counsel was paid approximately \$233,000. The United States Trustee moved to reopen the case to facilitate counsel filing a fee application, subject to review. Counsel objected in the form of a motion arguing that, post-dismissal, the bankruptcy court lacked jurisdiction to adjudicate the reasonableness of the fees counsel charged and received during the case. The bankruptcy court recounted ample case law supporting the proposition that, post-dismissal, it possessed jurisdiction to consider the issue of counsel's fees, including cases rejecting the very argument advanced by counsel. One of these cases, a Seventh circuit decision, referred to the bankruptcy court's "clean-up" or "ancillary" jurisdiction to adjudicate fee applications post-dismissal. *In re Sweports, Ltd.*, 777 F.3d 364, 367 (7th Cir. 2015).

A primary issue before the court in *In re Midway Gold US, Inc.*, No. 15-16835, 2017 WL 4480818 (Bankr. D. Colo. Oct. 6, 2017), was whether Tenth Circuit law prohibits third-party releases in chapter 11 plans or whether such releases could be approved in the appropriate circumstances. The court concluded that the lead Tenth Circuit case, *In re Western Real Estate Fund, Inc.*, 922 F.2d 592 (10th Cir. 1990), modified sub nom. *Abel v. West*, 932 F.2d 898 (10th Cir. 1991), did not prohibit in all circumstances third-party releases in chapter 11 plans. The court recounted the various multi-factor tests employed by the majority of the circuit courts which, depending on the facts, approve third-party releases, and concluded—without adopting a particular formulation—that the majority view was the correct view. Nevertheless, the court did recite a list of non-exclusive factors it would consider: (i) whether a release is appropriate should be considered on a case-by-case basis; (ii) examine "exactly who is releasing who from what," and that it is appropriate to distinguish between a debtor's release of non-debtors and third-parties' release of non-debtors; (iii) the release must be necessary for the reorganization and narrowly tailored to apply only to claims arising out of or in connection with the reorganization; (iv) whether the releasing creditors have consented to or objected to the proposed releases; and (v) releases cannot provide non-debtors with "blanket immunity" for all times, transgressions and omissions and may not include immunity from gross negligence or willful misconduct. In a very detailed and lengthy opinion, too long to be recounted here, the court considered third-party releases and exculpations in the debtor's chapter 11 plan, approving some and rejecting others, ultimately denying confirmation and setting a status conference, very likely to be followed by an amended plan that conforms to the court's analysis. For chapter 11 bankruptcy practitioners in the Tenth Circuit, the court's decision is a must-read, as is a recent, directly related decision from the bankruptcy court for the District of Delaware, *In re Millennium Lab Holdings II, LLC*, No. 15-

12284, 2017 WL 4417562 (Bankr. D. Del. Oct. 3, 2017), in which Judge Silverstein held that, post-*Stern v. Marshall*, 131 S. Ct. 2594 (2011), a bankruptcy court has the constitutionally authority to approve by final order a nonconsensual third-party release of a non-bankruptcy claim through the chapter 11 plan confirmation process.

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### **Eleventh Circuit**

***Palaxar Group, LLC v. Williams***

**--- Fed.Appx. ---, 2017 WL 4805486 (11th Cir. Oct. 25, 2017)**

Agreeing that the district court's denial of a motion to intervene was proper, the Eleventh Circuit dismissed the appeal since "our jurisdiction evaporates because the proper denial of leave to intervene is not a final decision."

Amodeo, an individual, attempted to intervene in litigation brought by two plaintiffs against 25 defendants who allegedly conspired to injure the plaintiffs by filing a chapter 11 in bad faith. Amodeo argued that he had an ownership interest in one of the defendants, however the Eleventh Circuit found his view of the record was inaccurate. The government had not returned his interest in the company but simply relinquished its ownership interest after the company was sued. While Amodeo raised other issues on appeal, the Eleventh Circuit would not consider arguments raised for the first time on appeal.

***Russell v. Redstone Fed. Credit Union,***

**--- Fed.Appx. ---, 2017 WL 4390375 (11th Cir. Oct. 3, 2017).**

The Eleventh Circuit affirmed the district court's *sua sponte* dismissal of Russell's complaint as barred by res judicata.

Russell alleged that certain creditors violated his rights in his prior bankruptcy case pursuant to the Fair Debt Collection Practices Act (FDCPA), the Truth in Lending Act (TILA), fraud by concealment, breach of fiduciary duty, negligence, violations of due process under the Fifth and Fourteenth Amendments, and claims under 42 U.S.C. § 1983.

The Eleventh Circuit held that the district court properly dismissed the claims under the FDCPA and TILA because the bankruptcy court previously entered a default judgment on the same nucleus of facts involving the same parties. The Court held that the plaintiff's claims for fraudulent concealment failed to allege clear and convincing facts that the defendants defrauded the bankruptcy court. Although the district court erred by dismissing the claims under the Fifth and Fourteenth Amendments and the Section 1983 claims on the basis of res judicata, the Eleventh

Circuit nevertheless affirmed dismissal of the Section 1983 claims because none of the defendants were government actors, and therefore Russell failed to state a cause of action. The district court properly declined to exercise supplemental jurisdiction over the remaining claims because the district court had already dismissed all the claims in which the district court had original jurisdiction.

***Moore v. Seterus, Inc.*,  
--- Fed.Appx. ---, 2017 WL 4708163 (11th Cir. Oct. 19, 2017)**

The Eleventh Circuit affirmed the district court's summary judgment in favor of the defendant, Seterus, Inc. (a servicer for Fannie Mae).

SunTrust bank, Fannie Mae's predecessor, filed a \$13,000 proof of claim in Moore's bankruptcy case for the amount that was necessary to cure the default on the loan secured by the Moore's home. Seterus applied the plaintiffs' chapter 13 payments to the oldest periodic payments in accordance with the mortgage loan documents. After the bankruptcy case was dismissed without a discharge, Seterus sent a demand letter to the plaintiffs for several months of delinquent mortgage payments, late fees, and other fees that were not included in the \$13,000 proof of claim. After a two-month investigation, Seterus responded to the plaintiffs that there was no error in applying the payments to the loan balance. The plaintiffs sued, alleging violations of the Fair Debt Collection Practices Act (FDCPA), the Real Estate Settlement Procedures Act (RESPA), and for breach of contract for miscalculation of the debt owed and threatening to foreclose without further notice.

The Eleventh Circuit held that the district court properly dismissed the claims under Section 1692e of the FDCPA because Seterus properly applied the payments to the earliest delinquent mortgage payments pursuant to the loan documents. Therefore, Seterus' demand letter was not false, deceptive, or misleading. Furthermore, the demand letter did not violate Section 1692e(5)'s prohibition against threatening to take action not legally permissible because, under the least sophisticated consumer standard, the demand letter clearly stated that Seterus would not foreclose unless allowed by applicable law. The Eleventh Circuit also held that the district court properly granted summary judgment on the plaintiffs' claims under RESPA and breach of contract because Seterus' investigation of the plaintiffs' claims was not unreasonable, and that the plaintiffs did not pay twice on the same debt.

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